United States Court of Appeals

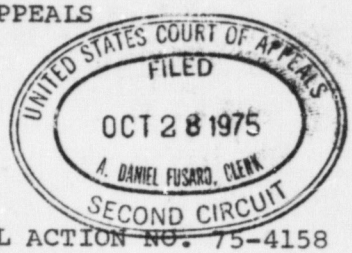
for the Second Circuit

PETITIONER'S BRIEF

75-4158

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT



HERNAN HERRERA-LETELIER and ELBA MARTINEZ DE HERRERA, Petitioners,	:	CIVIL ACTION NO. 75-4158
vs.	:	
IMMIGRATION AND NATURALIZATION SERVICE Respondent.	:	OCTOBER 18, 1975

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PETITIONERS' BRIEF IN SUPPORT OF PETITION FOR REVIEW OF FINAL DEPORTATION ORDER

FACTS: Both petitioners, who are husband and wife and natives of Chile, concede that they are subject to deportation for overstaying their admission into the United States as visitors. The male alien has been a resident of this country since June 5, 1970 and his wife since April 10, 1969. A deportation hearing was held on April 10, 1973 at which time both aliens applied for a stay of deportation pursuant to Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1253, on the grounds that they would be subject to persecution on account of their political opinions if they returned to Chile under the regime of Salvatore Allende. The hearing was adjourned to give the government time to investigate the claim of fear of political persecution.

A reopened hearing was held on February 5, 1974 and the application referred to above was denied on the grounds that the question at issue was moot because of the overthrow and death of Salvador Allende on September 11, 1973. An immediate

appeal was taken to the Board of Immigration Appeals with accompanying exhibits and memorandum by counsel. See item No. 5, Index to Administrative Record, filed herein by respondent. The Board of Immigration Appeals on February 3, 1975 dismissed the aliens' appeal. See item No. 4 of Index to Administrative Record. The petitioners on or about July 30, 1975, within the statutory appeal period, filed the petition now before this court.

ISSUES: Did the Immigration Judge and the Board of Immigration Appeals err as a matter of law in denying the petitioners' application to withhold deportation pursuant to Section 243(h) of the Immigration and Nationality Act?

Did the Immigration Judge err as a matter of procedural law in failing to grant an adjournment for petitioners to secure additional evidence relating to the new government in Chile?

DISCUSSION: The principal issue involved here relates to the exercise of statutory authority under Section 243(h) supra. The generally accepted rule in this arena states that the courts will not interfer with the exercise of discretion by an administrative body unless it is exercised illegally, arbitrarily or capriciously, or unless there was a clear failure to exercise discretion. This court discussed discretion by the Immigration and Naturalization Service in a 1966 case as follows: The denial of discretionary suspension of deportation to eligible aliens would be an abuse of discretion if it were made without a rational explanation. HANG vs. INS 360 F2d 715 at 719. The government in this case, without any rational explanation, has

apparently made no investigation of the current government in Chile in respect to whether it is a qualifying country under the statute in question. The practice has been in these cases for the Government to take the investigation of the Office of Refugee and Migration Affairs in the United States Department of State, as controlling. It is obvious in this case that the present government in Chile was not considered in the State Department's report. Item 15, Index to Administrative Record.

In some instances final determination on persecution claims have been deferred until complete information has been assembled by agencies of the United States Government. Diminich vs. Esperdy 299 F2d 244 (2nd Circuit 1961).

Facts or conditions which are matters of common knowledge may be recognized by administrative or judicial notice. Cantisani vs. Holton 248 F2d 737 (7th Circuit 1957). In this cited case, the court took notice that the existing government in Italy at that time was controlled by the Christian Democratic Party. It is common knowledge that for years any alien who was deportable and a native of Russia or China as well as most other communist governed countries automatically qualified for the benefits of 243(h), whether or not said alien could show a personal reason why he might be subject to persecution for political reasons if he returned.

James F. Greene, Deputy Commissioner of Immigration and Naturalization in a May 1974 paper reprinted in Vol. 51 No. 28 of the Interpreter Releases reports that as of February 1974 a total of 208,436 Cuban refugees had been adjusted for permanent residence in United States. The refugee statutes are similar if not identical to Section 243(h).

It is respectfully submitted by the petitioners that

the present government of Chile is every bit as repressive in respect to political freedom as the communist controlled governments listed above. The United States government has demonstrated that it readily accepts virtually all natives of communist controlled countries as eligible under 243(h), but finds it difficult to label any noncommunist country as politically repressive so that their natives can have their deportation orders stayed. It appears obvious to this writer that because of recent revelations that the United States Government assisted, at least financially, the overthrow of the Allende government, it is reluctant to take an immediate and forceful stand against the current Chilean government.

An O.A.S. 5 nation investigating team composed of South American countries plus the United States has charged the present Chilean government with extremely serious violations of human rights including torture of political prisoners. New York Times Dec. 10,1974, Page 8, Column 3.

The memorandum submitted by this counsel to the Board of Immigration Appeals and contained in Item No. 5 of the Index to Administrative Record is incorporated herein by reference and made a part hereof. Particular attention is called to a description of life in Chile copied from Newsweek magazine and attached to said memorandum and marked Exhibit A. Strict rules of evidence do not apply in presenting evidence under Section 243(h). Matter of Joseph 13 INS REPORTS 70.

In respect to failure of the Immigration Judge to grant an adjournment for petitioners to secure additional evidence relating to the new government in Chile, attention is called to the following case - Paschalidis vs. District Director 143 FS 310 (S.D. N.Y. 1956). In this cited case, the court found that

full opportunity to present additional evidence had been denied when the applicant had been denied a short adjournment to produce additional witnesses.

CONCLUSION: The petitioners claim that the failure of the government to grant their applications for a stay of deportation was an abuse of discretion in that the discretion was exercised arbitrarily, capriciously and without a rational explanation as heretofore explained. For the reasons stated the applications should be granted or in the alternative the matter should be referred back to the government for an investigation of the present Chilean government which has not been done as far as this case is concerned.

Copy hereof mailed
to U.S. Attorney in
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Respectfully submitted,

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